

The ruling you have requested has been amended as a result of litigation and has been attached to this document.



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

March 3, 2003

Ms. Sara Shiplet Waitt
Legal and Compliance Division
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR2003-1329

Dear Ms. Waitt:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 177294.

The Texas Department of Insurance (the "department") received a request for copies of 1) the report of the multi-state market conduct examination with supporting exhibits and documentation, 2) a consent decree, 3) a compliance plan, and 4) any and all audits since the entry of the consent decree that indicate that American Bankers Insurance Group, Inc. ("American Bankers") has violated the compliance plan in relation to transactions involving Texans.¹ You state that you do not possess information responsive to the first category of the request. You also state that you will release a copy of the consent decree responsive to the second category of the request to the requestor. However, you state that the release of information responsive to the third and fourth categories of the request may implicate the proprietary rights of American Bankers. Consequently, you notified this third party of the request for information under section 552.305 of the Government Code. *See Gov't Code* § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released). Although you do not take a position with regard to the disclosure of the submitted information, American Bankers has submitted briefing to this office in which it contends that the information responsive to the third and fourth categories of the request is excepted from disclosure under sections 552.101 and

¹In addition to seeking these four categories of information, the requestor also posed a number of questions to the department.

552.110 of the Government Code. We have considered American Bankers' claimed exceptions and reviewed the submitted representative sample of information.²

Initially, we address the department's assertion that part of the request asks the department to answer factual questions. The Public Information Act (the "Act") does not require a governmental body to answer factual questions, perform legal research, or create new information in responding to a request. *See* Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 534 at 2-3 (1989). Moreover, the Act applies only to information in existence at the time the governmental body receives the request for information. *See* Open Records Decision Nos. 452 at 2-3 (1986) (document is not within the purview of Act if, when governmental body receives request for it, it does not exist), 342 at 3 (1982) (Act applies only to information in existence, and does not require the governmental body to prepare new information). Accordingly, we find that the Act does not require the department to respond to the request inasmuch as the request asks the department to answer factual questions.

We turn now to American Bankers' arguments. Section 552.101 excepts from required public disclosure "information that is confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses confidentiality provisions such as those found in article 1.15 of the Insurance Code. Under that article, the department is required to visit each insurance carrier at least once every three years and examine its financial condition, ability to meet liabilities, and compliance with laws affecting the conduct of its business. Ins. Code art. 1.15, § 1; *see* Open Records Decision No. 640 (1996). In connection with this examination process, section 9 of article 1.15 provides:

A final or preliminary examination report, and any information obtained during the course of an examination, is confidential and is not subject to disclosure under the open records law.... This section applies if the carrier examined is under supervision or conservation but does not apply to an examination conducted in connection with a liquidation or a receivership under this code or another insurance law of this state.

The department has not informed this office, nor does it appear, that the information responsive to the third and fourth categories of the request was obtained during the course of an examination under article 1.15. Thus, we conclude that the information responsive to the third and fourth categories of the request is not confidential under section 9 of article 1.15 of the Insurance Code.

²We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

We next address American Bankers' section 552.110 argument. Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision and (2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained. American Bankers raises only the commercial and financial information prong of section 552.110. *See* Gov't Code § 552.110(b). A business entity raising section 552.110(b) is required to provide this office a specific factual or evidentiary showing, not conclusory or generalized allegations, that it would suffer substantial competitive injury from disclosure of its information. Gov't Code § 552.110(b); *see* Open Records Decision No. 661 (1999). After carefully reviewing American Bankers' arguments and the submitted information, we conclude that the American Bankers has not established that any of the requested information constitutes commercial or financial information, the release of which would cause American Bankers substantial commercial harm. Therefore, the department may not withhold the submitted information under section 552.110(b), and it must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

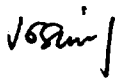
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



V.G. Schimmel
Assistant Attorney General
Open Records Division

VGS/sdk

Ref: ID# 177294

Enc: Submitted documents

c: Mr. David Lewallen
620 Willowood Trail
Keller, Texas 76248
(w/o enclosures)

Mr. Mark R. Leventhal
Counsel for American Bankers insurance Group, Inc.
JordanBurt
777 Brickell Avenue, Suite 500
Miami, Florida 33131-2803
(w/o enclosures)

CAUSE NO. GN300844

AMERICAN BANKERS INSURANCE
GROUP, INC.,
Plaintiff,

V.

THE HON. GREG ABBOTT, ATTORNEY
GENERAL, STATE OF TEXAS,

and

THE HON. JOSE MONTEMAYOR,
COMMISSIONER, TEXAS DEPARTMENT
OF INSURANCE,
Defendants.

§ IN THE DISTRICT COURT OF
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§ TRAVIS COUNTY, TEXAS
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§ 345th JUDICIAL DISTRICT

AGREED FINAL JUDGMENT

On this date, the Court heard the parties' motion for entry of an agreed final judgment. Plaintiff, American Bankers Insurance Group, Inc. (ABIG), and Defendants Greg Abbott, Attorney General of Texas, and Jose Montemayor, Commissioner, Texas Department of Insurance (TDI), appeared, by and through their respective attorneys, and announced to the Court that all matters of fact and things in controversy between them had been fully and finally compromised and settled. This cause is an action under the Public Information Act (PIA), Tex. Gov't Code ch. 552. In compliance with the Tex. Gov't Code § 552.325(c), the requestor was sent reasonable notice of this setting and of the parties' agreement that the TDI shall withhold the information at issue. The requestor was also informed of his right to intervene in the suit to contest the withholding of this information. The requestor has not informed the parties of his intention to intervene; neither has the requestor filed a motion to intervene or appeared today. After considering the agreement of the parties and the law, the Court is of the opinion that entry of an agreed final judgment is appropriate,

EXHIBIT A

disposing of all claims between these parties.

IT IS THEREFORE ADJUDGED, ORDERED AND DECLARED that:

1. The information at issue, specifically, the compliance plan and the monthly progress reports, is confidential by Tex. Ins. Code art. 1.15 § 9, and, therefore, is excepted from disclosure under the PIA, Tex. Gov't Code § 552.101.

2. The TDI shall withhold from the requestor the compliance plan and the monthly progress reports.

3. All costs of court are taxed against the parties incurring the same;

4. All relief not expressly granted is denied; and

5. This Agreed Final Judgment finally disposes of all claims between Plaintiff and Defendants and is a final judgment.

SIGNED this the _____ day of _____, 2003.

PRESIDING JUDGE

APPROVED:

RICHARD W. ALEXANDER
Cantey & Hanger Roan & Autrey L.L.P.
200 Wells Fargo Bank Tower
400 West Fifteenth Street
Austin, Texas 78701-1647
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Fax: 469-0474
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ATTORNEY FOR PLAINTIFF

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P. O. Box 12548, Capitol Station
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Fax: 320-0167
Bar No. 12585600
ATTORNEY FOR DEFENDANTS

CAUSE NO. GN300844

AMERICAN BANKERS INSURANCE
GROUP, INC.,
Plaintiff,

V.

THE HON. GREG ABBOTT, ATTORNEY
GENERAL, STATE OF TEXAS,

and

THE HON. JOSE MONTEMAYOR,
COMMISSIONER, TEXAS DEPARTMENT
OF INSURANCE,
Defendants.

§ 87(2)(b)

IN THE DISTRICT COURT OF

TRAVIS COUNTY, TEXAS

345th JUDICIAL DISTRICT

MOTION FOR ENTRY OF AN AGREED FINAL JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

Plaintiff American Bankers Insurance Group, Inc. (ABIG), and Defendants Greg Abbott, Attorney General of Texas, and Jose Montemayor, Commissioner, Texas Department of Insurance (TDI) (collectively referred to as the State), file this motion for entry of an agreed final judgment, and move the court to enter an agreed final judgment on the settlement agreement executed by the parties in the above-numbered and styled case. In support of this motion, movants would show:

1. ABIG filed an action against the State pursuant to the Public Information Act (PIA), Tex. Gov't Code Ann. ch. 552 (West 1994 & Supp. 2002), seeking to withhold certain information from public disclosure.
2. All matters in controversy between ABIG and the State have been resolved, and they have agreed to the filing of this motion and the entry of an order as sought by this motion. See

EXHIBIT B

Exhibit 1, Settlement Agreement.

3. In settlement of this dispute, ABIG and the State have agreed that in accordance with the PIA and under the facts presented, the information at issue, specifically, the compliance plan and the monthly progress reports, is confidential by Tex. Ins. Code art. 1.15 § 9, and, therefore, is excepted from disclosure under the PIA, Tex. Gov't Code § 552.101, and that the TDI must withhold this information from the requestor.

4. Tex. Gov't Code § 552.325(d) requires the Court to allow a requestor a reasonable period to intervene after notice is attempted by the Attorney General. On _____, 2003, the Attorney General sent to David Llewallen, the requestor, notice, as required by § 552.325(c), and notice of the setting of this matter on the uncontested docket, which has been scheduled for at least 15 days after the filing of this motion.

WHEREFORE, PREMISES CONSIDERED, Plaintiff American Bankers Insurance Group, Inc. and Defendants Greg Abbott, Attorney General of Texas, and Jose Montemayor, Commissioner, Texas Department of Insurance, respectfully move that this Court enter an agreed final judgment on the settlement agreement.

Respectfully submitted,

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200 Wells Fargo Bank Tower
400 West Fifteenth Street
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BARRY R. MCBEE
First Assistant Attorney General

JEFFREY S. BOYD
Deputy Attorney General for Litigation

DON WALKER
Chief, Administrative Law Division

ATTORNEYS FOR DEFENDANTS
GREG ABBOTT, ATTORNEY GENERAL
OF TEXAS, AND JOSE MONTEMAYOR,
COMMISSIONER, TEXAS DEPARTMENT
OF INSURANCE

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion for Entry of an Agreed Final Judgment has been served, on _____, 2003, by certified mail, return receipt requested, to the following attorney-in-charge:

RICHARD W. ALEXANDER
Cantey & Hanger Roan & Autrey L.L.P.
200 Wells Fargo Bank Tower
400 West Fifteenth Street
Austin, Texas 78701-1647
Telephone: 474-4200
Fax: 469-0474
State Bar No. 00997600
ATTORNEY FOR PLAINTIFF

BRENDA LOUDERMILK

SETTLEMENT AGREEMENT

This Settlement Agreement (Agreement) is made by and between Greg Abbott, the Attorney General of Texas, and Jose Montemayor, Commissioner, Texas Department of Insurance (TDI), (collectively, referred to as the State) and American Banker's Insurance Group, Inc. (ABIG). This Agreement is made on the terms set forth below:

WHEREAS, on December 9, 2002, the TDI received a written request for information under the Public Information Act (PIA), for information concerning ABIG;

WHEREAS, the TDI provided some responsive information to the requestor, David Llewallen, but as to the remaining responsive information, a compliance plan and monthly progress reports of ABIG, that were connected to a multi-state examination of ABIG, and the subsequent consent order, the TDI, on December 20, 2002, asked for an open records ruling from the Attorney General of Texas, pursuant to the PIA, Tex. Gov't Code §§ 552.301 and 552.305, because ABIG asserted proprietary interests in these documents;

WHEREAS, ABIG submitted arguments to the Attorney General, claiming that the compliance plan and the monthly progress reports (the information at issue) were confidential by law, under Insur. Code art. 1.15 § 9, and the monthly progress reports were excepted from disclosure as commercial or financial information under Tex. Gov't Code § 552.110(b);

WHEREAS, the Attorney General issued Letter Ruling OR2003-1329 in response to the TDI's request, concluding that based on the information submitted to him, the information was not confidential under the Insurance Code and that ABIG had not met its burden of establishing that the information was excepted from disclosure by Tex. Gov't Code § 552.110(b);

WHEREAS, ABIG disputed the ruling in OR2003-1329 and filed a lawsuit, styled Cause No. GN300844, *American Banker's Ins. Group, Inc. v. Greg Abbott, Attorney General of Texas and Jose*

Montemayor, Commissioner, Texas Dep't of Ins., in the 345th Judicial District Court of Travis County, Texas (this lawsuit), to preserve its rights under the PIA;

WHEREAS, as a result of discovery, the TDI has concluded that it obtained the information during the course of the multi-state examination, and, therefore, the information should be considered confidential under section 9 of article 1.15 of the Insurance Code;

WHEREAS, Tex. Gov't Code § 552.325(c) allows the Attorney General to enter into settlement under which the information at issue in this lawsuit may be withheld, and the parties wish to resolve this matter without further litigation;

NOW THEREFORE, for good and sufficient consideration, the receipt of which is acknowledged, the parties to this Agreement stipulate that:

1. The information at issue, the compliance plan and the monthly progress reports, is excepted from public disclosure by Tex. Ins. Code art. 1.15 § 9 and Tex. Gov't Code § 552.101.
2. The TDI shall withhold from the requestor the compliance plan and the monthly progress reports.
3. The State and ABIG agree to the entry of an agreed final judgment in the form attached to this Agreement as Exhibit A. Immediately upon the effective date of this Agreement, the parties will file an agreed motion for entry of an agreed final judgment, in the form attached to this Agreement as Exhibit B. The motion and order will be presented to the court for approval, on the uncontested docket, with at least 15 days prior notice to the requestor.
5. The Attorney General agrees that he will also notify the requestor, as required by Tex. Gov't Code § 552.325(c), of the proposed settlement and his right to intervene to contest the withholding.
6. Each party to this Agreement will bear its own costs, including attorney fees, relating

to this litigation.

7. The terms of this Agreement are contractual and not mere recitals, and the agreements contained herein and the mutual consideration transferred is to compromise disputed claims fully, and nothing in this Agreement shall be construed as an admission of fault or liability, all fault and liability being expressly denied by all parties to this Agreement;

8. American Bankers Insurance Group, Inc. warrants that its undersigned representative is duly authorized to execute this Agreement on its behalf and that its representative has read this Agreement and fully understands it to be a compromise and settlement and release of all claims that ABIG has against the State arising out of the matters described in this Agreement.

9. Jose Montemayor, Commissioner, Texas Department of Insurance, warrants that his undersigned representative is duly authorized to execute this Agreement on his behalf and that his representative has read this Agreement and fully understands it to be a compromise and settlement and release of all claims that the TDI has against ABIG arising out of the matters described in this Agreement.

10. The Attorney General warrants that his undersigned representative is duly authorized to execute this Agreement on behalf of the Attorney General and his representative has read this Agreement and fully understands it to be a compromise and settlement and release of all claims that the Attorney General has against ABIG arising out of the matters described in this Agreement.

11. This Agreement shall become effective, and be deemed to have been executed, on the date on which the last of the undersigned parties signs this Agreement before a notary public.

AMERICAN BANKERS INSURANCE
GROUP, INC.

By: [Signature]
name: Jerome A. Atkinson
title: General Counsel

Date: 6/30/03

JOSE MONTEMAYOR, COMMISSIONER,
TEXAS DEP'T OF INSURANCE

By: [Signature]
name: Albert Bett Jr.
title: Sr. Associate Commissioner

Date: 7/8/03

GREG ABBOTT
ATTORNEY GENERAL OF TEXAS

By: [Signature]
name: Brenda Loudermilk
title: Asst. Attorney General

Date: 7/10/03

THE STATE OF GA §
COUNTY OF DEB §

Before me, the undersigned authority, on this date, personally appeared, Jerome Atkinson
_____, known to me [or proved to me on the oath of _____
, or through _____ (insert description of identity card or other document)] to be the
person whose name is subscribed to the foregoing instrument, and acknowledged to me that he/she
executed the same, on behalf of American Bankers Insurance Group, Inc., for the purposes and
consideration therein expressed.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this the 30 day of
June, 2003.

SUSAN E. SMALL
Notary Public, Fulton County, Georgia.
My Commission Expires February 10, 2004.

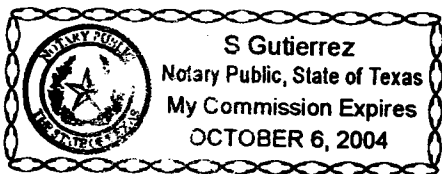
[Signature]
Notary Public, In and For
The State of GA

THE STATE OF TEXAS
COUNTY OF TRAVIS

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Before me, the undersigned authority, on this date, personally appeared, ALBERT BETTS, JR., known to me [or proved to me on the oath of _____, or through _____ (insert description of identity card or other document)] to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he/she executed the same, on behalf of Jose Montemayor, Commissioner, Texas Department of Insurance, for the purposes and consideration therein expressed.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this the 8th day of July, 2003.

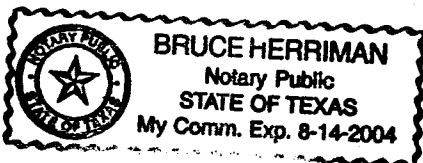


S. Gutierrez
Notary Public, In and For
The State of Texas

THE STATE OF TEXAS §
COUNTY OF TRAVIS §

Before me, the undersigned authority, on this date, personally appeared, Brenda Loudermilk, known to me [~~or proved to me on the oath of~~ _____, or through _____ (insert description of identity card or other document)] to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he/she executed the same, on behalf of Greg Abbott, Attorney General of Texas, for the purposes and consideration therein expressed.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this the 10th day of July, 2003.



Bruce Herriman
Notary Public, In and For
The State of Texas